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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/455,574	12/06/1999	AALBERTUS PIETER KROESBERGEN	702/991620	5330

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RUSSELL D ORKIN  
700 KOPPERS BUILDING  
436 SEVENTH AVENUE  
PITTSBURGH, PA 152191818

EXAMINER

JOHNSON, JONATHAN J

ART UNIT	PAPER NUMBER
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1725

DATE MAILED: 03/18/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/455,574

Applicant(s)

KROESBERGEN, AALBERTUS  
PIETER

Examiner

Jonathan Johnson

Art Unit

1725

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 February 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 2-26-03. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☒ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: 40 and 41.Claim(s) rejected: 35,36,38,39,42-50 and 61-64.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8. ☐ The proposed drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

Continuation of 5. does NOT place the application in condition for allowance because: To establish unexpected results over a claimed range, applicants should compare a sufficient number of tests both inside and outside the claimed range to show the criticality of the claimed range. In re Hill, 284 F.2d 955, 128 USPQ 197 (CCPA 1960). Whether the unexpected results are the result of unexpectedly improved results or a property not taught by the prior art, the "objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support." In other words, the showing of unexpected results must be reviewed to see if the results occur over the entire claimed range. In re Clemens, 622 F.2d 1029, 1036, 206 USPQ 289, 296 (CCPA 1980) (Claims were directed to a process for removing corrosion at "elevated temperatures" using a certain ion exchange resin (with the exception of claim 8 which recited a temperature in excess of 100C). Appellant demonstrated unexpected results via comparative tests with the prior art ion exchange resin at 110C and 130C. The court affirmed the rejection of claims 1-7 and 9-10 because the term "elevated temperatures" encompassed temperatures as low as 60C where the prior art ion exchange resin was known to perform well. The rejection of claim 8, directed to a temperature in excess of 100C, was reversed.). See also In re Grasselli, 713 F.2d 731, 741, 218 USPQ 769, 777 (Fed. Cir. 1983) (Claims were directed to certain catalysts containing an alkali metal. Evidence presented to rebut an obviousness rejection compared catalysts containing sodium with the prior art. The court held this evidence insufficient to rebut the prima facie case because experiments limited to sodium were not commensurate in scope with the claims.). In the instant case, applicant has claimed a semi-spherical islet with a diameter between 10 and 1000 microns, however applicant only presents a singular test result of a semi-spherical islet having a diameter of 250 microns to show unexpected results. It is the examiner's position that the applicant has not met his burden of proving unexpected results over the entire claimed range. Furthermore, it is the examiner's position that the singular test result presented by applicant fails to establish a trend in the exemplified data which would allow the artisan to reasonably extend the probative value the evidence through the claimed range.

The information disclosure statement filed 2-26-03 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because applicant has not provided (A) a statement as specified in 37 CFR 1.97(e) (see the discussion in subsection B(5) and (B) the fee set forth in 37 CFR 1.17. It has been placed in the application file, but the information referred to therein has not been considered as to the merits. Applicant is advised that the date of any re-submission of any item of information contained in this information disclosure statement or the submission of any missing element(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the statement, including all certification requirements for statements under 37 CFR 1.97(e). See MPEP § 609 C(1). . .



**TOM DUNN**  
**SUPERVISORY PATENT EXAMINER**  
**TECHNOLOGY CENTER 1700**